No. 13,562

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

FRANK LUEHR, and JONES STEVEDORING COMPANY, a corporation,
Appellees.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR THE UNITED STATES.

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JURISDICTION.

This is an appeal in admiralty from the final decree (R. 72) made and entered herein by the United States District Court for the Northern District of California, Southern Division, on April 11, 1952, in favor of appellee Frank Luehr, and from the final decree (R. 70) made and entered herein on April 11th dismissing appellee Jones Stevedoring Company from liability under the petition of the United States impleading said appellee under Rule 56. Said petition sought recovery-over of any amounts for which the United States was found liable on the amended

libel (R. 3) brought against the United States under the Public Vessels' Act, 1925 (46 U.S.C. 781 et seq.) by an injured longshoreman to recover damages in consequence of a personal injury on board the USNS SHAWNEE TRAIL.

The amended libel was also directed against the American Pacific Steamship Company, a corporation. During the course of the trial proceedings, the respondent American Pacific Steamship Company was dismissed by the District Court (R. 38) and no appeal is taken from that order of dismissal and said respondent American Pacific Steamship Company is not a party to this appeal.

Notice of appeal was filed July 8, 1952 (R. 73) and the appeal was allowed July 14, 1952 (R. 74). The jurisdiction of the Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (as revised, 28 U.S.C. 1291).

STATEMENT OF THE CASE.

Shortly before noon on July 28, 1950, Frank W. Luehr, a longshoreman employed by the Jones Stevedoring Company, was injured while working on board the USNS SHAWNEE TRAIL, which was docked at Naval In-Transit Dock No. 3, Alameda, California. At the time of the accident, the Jones Stevedoring Company was loading a deck cargo of airplanes on the mechano deck of the SHAWNEE TRAIL. This

stevedoring operation was being carried on by the Jones Stevedoring Company under the terms of a stevedoring contract with the Federal Government, designated as DA 04-197 TC-246. (Govt. Exhibit "B".) The airplanes were being lifted from a barge alongside the SHAWNEE TRAIL and lowered to the mechano deck of the SHAWNEE TRAIL by an Army derrick barge.

At the time of the injury, one of the airplanes had been lowered to within a few feet of the mechano deck of the SHAWNEE TRAIL, and Luehr was standing on the mechano deck partially under the suspended airplane. At this point the crane operator aboard the derrick barge inadvertently released the friction gear and the plane dropped suddenly, thereby striking Mr. Luehr and throwing him from the mechano deck of the tanker to the main deck some seven feet below. The crane operator aboard the derrick barge was a United States Army Civil Service employee. The stevedores aboard the USNS SHAWNEE TRAIL were all employees of the Jones Stevedoring Company and were directly under the supervision of a foreman employed by Jones. The airplanes were being located on the vessel in accordance with the previously made up cargo plan provided by the United States Army Air Force.

The contract between the Federal Government and the Jones Stevedoring Company, under which this loading operation was being performed, provides in part as follows:

"Article 14. *Liability and Insurance.*

(a) The Contractor

(1) shall be liable to the Government for any and all loss of or damage to cargo, vessels, piers or any other property of every kind and description, and

(2) shall be responsible for and shall hold the Government harmless from any and all loss, damage, liability and expense for cargo, vessels, piers or any other property of every kind and description, whether or not owned by the Government, or bodily injury to or death of persons occasioned either in whole or in part by the negligence or fault of the Contractor, his officers, agents, or employees in the performance of work under this contract. The general liability and responsibility of the Contractor under this clause are subject only to the following specific limitations.

(b) The Contractor shall not be responsible to the Government for and does not agree to hold the Government harmless from loss or damage to property or bodily injury to or death of persons.

(1) If the unseaworthiness of the vessel or failure or defect of the gear or equipment furnished by the Government contributed jointly with the fault or negligence of the Contractor in causing such damage, injury, or death, and the Contractor, its officers, agents and employees by the exercise of due diligence, could not have discovered such unseaworthiness or defect of gear or equipment, or through the exercise of due dili-

gence could not otherwise have avoided such damage, injury, or death.

(2) If the damage, injury or death resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents or employees of the Contractor with specific direction of the Contracting Officer."

After the accident, Mr. Luehr was hospitalized, and at the time of the trial in the District Court had received compensation under the Longshoremen's and Harbor Workers' Act in the sum of $3,082.20, and in addition had received medical attention costing approximately $7,322.32. The Contract between Jones Stevedoring Company and the Federal Government further provides, at Section 14(c):

"The contractor shall, at his own expense, procure and maintain, during the terms of this contract, insurance as follows :

(1) Standard Workmen's Compensation and Employers' Liability Insurance and Workmen's and Harbor Workers' Compensation Insurance, or such of these as may be proper under applicable state or Federal statutes.

(2) Bodily injury liability insurance in an amount of not less than $50,000.00 any one person and $250,000.00 any one accident or occurrence."

Jones Stevedoring Company obtained such insurance, and on each of the policies was an endorsement reading as follows:

> "Anything in the policy to the contrary notwithstanding, it is understood and agreed that the Company waives all rights of subrogation against the United States of America that it might have by reason of payment under this policy."

At the conclusion of the trial in the District Court, the District Judge awarded to the libelant the sum of $125,000.00, with interest and costs, against the United States, without indemnity-over from the Jones Stevedoring Company under the terms of the contract.

QUESTIONS PRESENTED.

The first question presented here is whether or not the presence of the injured stevedore (an employee of Jones) under the suspended load, which was subsequently negligently dropped by a United States employee, involved negligence of an employee of Jones so as to make the company liable-over to the United States for the amount of such judgment under the terms of the contract whereby the contractor has agreed to be wholly liable for any personal injury occasioned "in whole, or in part by the negligence or fault of the contractor, his officers, agents or employees in the performance of work under this contract". The contract further provides: "The general liability and responsibility of the contractor under this clause are subject only to the following specific limitations." The only specific limitation pertinent

here reads as follows: "(b)(2) If the damage, injury or death resulted solely from an act or omission of the Government or its employees * * *" So, conversely, the question can be stated: In view of the proven fact that the injured man placed himself in a position of danger under a suspended load, and that he was not warned to remove himself therefrom by the Stevedore foreman at the time the foreman knew and had ordered the load to be moved, have the Stevedore so excused themselves from negligence as to escape their general liability under the contract by proving that the accident falls within the terms of the contract exceptions in that it was caused solely by the negligence of an employee of the Government?

The second question presented is whether or not the judgment should be reduced by the amount of compensation and medical expenses paid by the insurer of the employer Jones, in view of the express waiver of subrogation against the United States.

The third question presented is whether or not the award of $125,000.00 is excessive to a stevedore 53 years old at time of trial, who averaged approximately $3,400 yearly wage immediately prior to injury, had permanent disability but probably not total disability, loss of wages at time of trial of $3,700, and hospital expenses of $7,322.32, especially when evidence shows the award necessarily includes $85,000 to $90,000 general damages.

SPECIFICATIONS OF ERROR.

The District Court erred:

1. In holding that the injuries to the libelant were caused solely by the exclusive negligence of the respondent United States of America.

2. In holding that the injuries to the libelant were not caused in whole or in part, or at all by the negligence of Jones Stevedoring Company, its officers, agents or employees.

3. In holding that the Jones Stevedoring Company is not obligated to respond to the United States by way of indemnity under the terms of their contract with the Government.

4. In failing to credit to the award of $125,000.00 the amounts of compensation and hospital expenses paid to libelant by his employer under the terms of the Longshoremen's and Harbor Workers' Insurance.

5. In holding that by reason of the libelant's injuries he has been damaged in the sum of $125,000.00.

SUMMARY OF ARGUMENTS.

It is herein argued:

1. That the United States is entitled to indemnity from the impleaded respondent, Jones Stevedoring Company, under the terms of a contract between the two parties wherein the Stevedore agrees to hold harmless the United Statess, for any damages arising from personal injury "occasioned in whole or in

part'' by the negligence of the Stevedore, its agents, officers or employees. Under the terms of the contract the Stevedore assumed primary liability for personal injuries occasioned in the performance thereof. The contract excuses them from liability only in the complete absence of negligence on their part. The evidence shows that there was negligence of the Stevedore's employees which contributed to this accident. It consisted of the injured man's own negligence in going underneath a suspended load, contrary to the provisions of the Pacific Coast Marine Safety Code, promulgated for his own safety, and thereby unnecessarily exposing himself to danger; and secondly, in the failure of the Stevedore foreman to warn Luehr to get out from under the plane when he knew that the plane was about to be moved.

2. That the amounts already paid to the libelant by the employer in the form of compensation and medical expenses should be credited to any award the libelant receives since the employer has expressly waived the right to subrogate against the United States, and consequently should not be allowed to recover the compensation payments through the conduit of the injured man. The District Court for the Eastern District of Pennsylvania correctly interpreted this same waiver of subrogation agreement in *Palardy v. U. S.,* 102 Fed. Supp. 534.

3. That the award of $125,000.00 to the libelant is grossly excessive in that it must necessarily contemplate an award of some $85,000 to $90,000 for general, non-pecuniary damages. In cases involving

equally serious injuries resulting in greater degrees of permanent disability to men younger that the libelant, with both greater earning capacity and longer period of working expectancy, the Courts have consistently awarded as reasonable damages sums amounting to far less than half of the award in the present case.

THE STEVEDORE MUST HOLD THE UNITED STATES HARMLESS IN ACCORDANCE WITH THE EXPRESS TERMS OF THE CONTRACT.

The testimony in the record shows the following facts to be true with regard to the manner in which Mr. Luehr was injured. We do not believe there is any serious disagreement between the parties in this respect.

The scene of the accident was described as follows: The USNS SHAWNEE TRAIL was docked at the Army In-Transit Dock No. 3 in Alameda. This dock is in a calm, protected body of water. The SHAWNEE TRAIL was docked port side to the dock. A large Army derrick barge (designated BD3031) was moored to the outboard side of the SHAWNEE TRAIL. On the outboard side of the derrick barge there was moored a barge load of jet airplane bodies, with engine and tail removed.

The SHAWNEE TRIAL was a Navy tanker equipped with what is termed a mechano deck. A mechano deck is a type of superstructure built of steel I beams above the main deck of the tanker. The

beams make up a skeleton-like structure appearing much like the steel skeleton of a building during construction.

The dimensions of this mechano deck are as follows:

I. Columns:

Height (Base Plate to Cap)

Allowing for camber of deck, varies from 7′—9½″ inboard to 8′—9 7/16″ on extreme outboard column.

Allow 3¼″ for height of base plate.

II. Distance between columns:

Longitudinal—12′

Thwartships 8′—4″

III. Transverse Eye Beams:

Length—32′ (approx.)

Width—14¼″

Distance—between 12′

IV. Longitudinal Eye Beams:

Length—13′ (approx.)

Width—6″

Thickness—6″

The Court may better understand the appearance of this deck by observing the model used during the trial. (Resp. Imp. Ex. No. A-1.)

Prior to the accident, eleven or twelve planes had been loaded aboard the mechano deck of the tanker. The method of loading was as follows: The men on the barge containing the airplanes would fasten slings to the planes and to the slings they would attach the

hook from the fall of the auxiliary hoist of the derrick barge. The derrick operator would then lift the planes high in the air and swing them over the deck of the SHAWNEE TRAIL. During this operation the airplanes would be steadied and prevented from swinging by stevedores on the derrick barge and the tanker, who held onto long rope taglines attached to various portions of the airplanes. The derrick operator was seated in the cab of the derrick which is elevated above the deck of the derrick barge. (See Libelant's Exhibits Nos. 8, 9, and 11.) He maneuvered the load in accordance with whistle signals from the derrick barge foreman, who was stationed on the catwalk of the tanker. The airplanes were placed upon the mechano deck in a pattern previously furnished by a representative of the Army. These airplane bodies were fastened securely to the mechano deck by attaching the landing gear of the plane to small wooden platforms which were bolted to the eye beams of the mechano deck. The wheels of the planes had been removed and in their place a small steel tripod was attached to the axle. These tripods were intended to be seated on the platform and secured thereto. These airplanes had three landing struts. One under each wing and one under the nose. Each of these struts was equipped with a tripod, and each was to be fastened to a platform. At the time of the accident a plane had been lifted from the barge and swung over the inboard side of the tanker. It had been lowered to within a few feet of the mechano deck. As the airplane was descending, Mr. Luehr, the

injured man, was instructed by his gang boss to go up on top of the mechano deck to aid in steadying the plane. (R. 538.) In compliance with these orders, Mr. Luehr climbed up on the mechano deck and approached the airplane. The airplane was stopped in its descent and when he got near the plane he reached underneath the wing of the plane and placed his left hand upon the landing gear. He was standing on a thwartship beam, and to steady himself he placed his right hand upon the fuselage of the airplane. (R. 341.)

In compliance with orders of the Stevedore foreman, the signal was then given to the derrick operator to "boom down". This maneuver was intended to move the plane aft and inshore (R. 162), without lowering the plane (R. 218-219).

The derrick operator then leaned forward in the cab to get a clear view, in order to see that his boom would clear the ship's rigging, and in doing so, he caught the sleeve of his coveralls on the friction lever controlling the fall-line to which the plane was attached. (R. 219.) This released the friction and the plane dropped. The wings and fuselage of the plane struck the beams of the mechano deck. (R. 116.) At the time the plane fell Mr. Luehr was partially underneath it, and consequently was struck by the falling plane and was knocked from the beam on which he was standing to the main deck of the tanker.

The first question presented to this Court is whether or not, under the facts of this accident, Jones Steve-

doring Company must hold the Government harmless under the terms of its contract wherein it is provided that Jones "shall hold the Government harmless from any and all loss" for "bodily injury * * * occasioned either in whole or in part by the negligence or faults * * * of his officers, agents, or employees".

More accurately, the question is whether the Stevedore has proved itself to be entirely free from negligence so as to be excused from its general liability under the terms of the contract exception which excuses the Stevedore only if the accident is occasioned "solely" by the negligence of the Government employees.

It is not simply a question of determining the major cause of the accident and placing liability upon the party responsible for it. To the effect that there can be more than one proximate cause, see *Porello v. U. S.* (C.A. 2nd Cir. 1946), 153 F. (2d) 605 at page 607 (later hearing 330 U.S. 446), wherein the Court stated:

> "The unsound notion that there can be but one 'proximate cause' of an accidental injury has caused some confusion in the cases."

This is a case requiring determination of all causes of the accident, and if it be found upon examination that one of the causes is attributable to the negligence of any employee of Jones, then all of the liability must be upon Jones, for they have contracted to be so liable.

For this reason the facts require a thorough, logistical analysis. There are two primary reasons for

the injury to Mr. Luehr. (1) The plane fell, and (2) Mr. Luehr was under the plane. In the absence of either of these factors, there would have been no injury to Mr. Luehr.

The first cause is attributable to the negligence of the derrick operator. The question then remains as to whether or not Mr. Luehr's presence under the plane involved negligence on his part, or on the part of any other employee of Jones.

To determine this, it must be determined whether Luehr's action in placing himself under a suspended load was conduct which fell below the standard to which he should conform for his own protection.

During the course of the trial, the Government submitted into evidence a manual entitled "Pacific Coast Marine Safety Code", copies of which have been made available to the Court (Government's Exhibit "A"). This code is a part of the contract between the Stevedore Union and the employers, and by its terms sets up the minimum requirements for safety of life and limb. (Rule 102, Pacific Coast Marine Safety Code, Government's Exhibit "A".)

Rule 901 of this code provides that sling loads are not to be suspended over men's heads, and naturally the converse is true; i.e., that men are not to be present under loads. The foreman of the Stevedores testified that it was his understanding of the section of the Code that it prohibited men going underneath a suspended load when he stated with regard to the Code "it says a man shall not stand under a load." (R. 164.)

Rule 911 provides further:

> "When assisting to steady in hoisting or landing a sling load, longshoremen shall not stand in the line of travel of the load nor between the load and any nearby fixed object and shall always face the load. Drafts should be lowered to shoulder height before longshoremen take hold of them for steadying or landing."

The wording of this section should be interpreted to prohibit men from standing under a load. The wording which prohibits longshoremen from standing in line of travel of load and any nearby fixed object is intended primarily to prohibit longshoremen from standing between a traveling load and a bulkhead, but it obviously covers the situation where the travel of the load is downward and the nearby fixed object is a deck. The wording stating that loads be lowered to shoulder height before longshoremen be allowed to take hold of them is obviously intended to prohibit longshoremen from going under a load to steady it.

Mr. Luehr's presence under the load was in violation of the minimum safety practices as established by the stevedores themselves. His negligent exposure of himself to danger and the failure of his employer and himself to exercise reasonable care for his own protection is a legally contributing cause of his harm.

At the trial, both appellee Luehr and appellee Jones attempted to excuse this obvious violation of the standards of safety by attempting to show that it was necessary for Mr. Luehr to be under the airplane at the time in order to perform his job. The great

weight of the testimony directly contradicts this contention. All of the testimony indicates that there was no necessity of going beneath the suspended planes until the landing gears were spotted over the platforms intended to receive them.

This plane was not spotted over the platforms at the time Mr. Luehr went underneath it. This is most convincingly proved by the fact that when it fell the landing gear did not land on the platform, but on the contrary, the landing gear went between the eye beams, and the wings and fuselage struck the mechano deck. The testimony of Mr. Spirz, the walking boss of Jones Stevedoring Company on this point, was as follows (R. 116):

> "Q. Did the plane rest where it fell, or did it bounce or move?
>
> A. The—when the plane hit, when it hit it hit with the fuselage, the belly of the fuselage, and it hit and it bounced.
>
> Q. It hit the——
>
> A. It hit the mechano deck and it actually bounced, and I would say, and I think it bounced a foot."

The fact that it was not spotted over the platform is further shown by Spirz' testimony (R. 115):

> "A. Well, when the plane stopped, Mr. Rosenstock and Charlie, the whistleman, three of us there, I had my hand on the nose of the plane, I always want to know when it stops moving, and *Rosenstock and I agreed we should move it over a little bit more towards the house.*
>
> Q. That would be aft?
>
> A. That would bring it aft * * *"

The derrick operator testified that the plane was stopped three or four minutes at a place two to two and one-half feet from the position over the platform. (R. 218-219.)

The testimony of almost every witness, including both those called on behalf of the impleaded respondent Jones Stevedoring Company, and those called on behalf of the Government, is clear that there is no necessity for being under the suspended airplane until after the landing gear is spotted over the platform. At that time, of course, it is necessary to go under and fasten the tripods to the platforms, but then the danger of injury is minimized, for if the fall should be released, the landing gear would strike the platform, and the body and wings of the plane would remain elevated as when it is normally landed on the ground.

The testimony as to the necessity of being under the plane prior to the time it was spotted over the platform is excerpted, as follows, for the convenience of the Court.

Mr. Spirz, the longshore walking boss in charge of the operation, testified (R. 191):

> "A. At this moment it wasn't necessary to have three men out there, because we still had to move the plane. We were fortunate in one respect, that we had still to move the plane, because we might have had three or five men there at the time the plane dropped. Now, because we had to move the plane over the foot or so nobody was getting underneath to move the platform or the movable beams.

Q. Do I gather from what you say it was unnecessary at that particular stage for anybody to get under there?

A. At that particular point. It was only to hold that plane safe.

Q. In other words, steadying it, not move it.

A. Steady it so it wouldn't move."

Mr. Luehr, the injured stevedore, testified that he was merely attempting to steady the plane from swinging (R. 357):

"Mr. Harrison. Q. I interpret your testimony to be, you were up there to steady the airplane?

A. That is right.

Q. Did you have the platform with you that was going to go underneath the wheel?

A. The platform already was underneath there.

Q. Did you have the bolts with you that they needed in fastening the landing gear to the platform?

A. No, sir.

Q. Were you going to fasten it?

A. No, sir.

Q. You were there to steady it, is that right?

A. That is right."

Mr. Rosenstock, the Army employed supercargo, who was there to watch after the welfare of the airplanes, and who testified he had been present at the loading of hundreds of such planes, testified that the job of steadying the plane could be done by merely holding onto the wing. (R. 478.)

Mr. Nystrom, an expert in handling loading operations such as this, and a witness called by Jones, testified as follows (R. 524):

> "Q. But to be—to make it clear, to the best of your knowledge, it is not necessary for a man to go under there to do anything with the tripods until it arrives over that platform, is that right?
> A. Yes."

Mr. Greene, a fellow longshoreman of Luehr, testified he was performing the job of steadying by holding onto the wings (R. 535):

> "Q. Just what were you doing to steady the plane as it came down?
> A. I had hold of the wing."

Mr. Lemkuhl, a volunteer expert called by the Government, and a man who had loaded many planes on mechano decks, and in fact the man who loaded Jimmy Doolittle's planes for the historic bombing of Tokyo, said:

> "It wasn't absolutely necessary for people to go under the plane. Some of my people did it and were reprimanded rather sharply for it." (R. 588.)

Mr. Lemkuhl's testimony on this most pertinent point was as follows (R. 592):

> "A. As you lower it down, you control the airplane by using tag lines, and it is barely floating above the platform or footing, and before anyone can go underneath to touch any part of the airplane."

Mr. Lemkuhl stated in cross-examination (R. 593):

"Q. But sometimes they don't land square.

A. That could be true, but I stated that I did not allow any personnel under the plane until it was practically in a resting position with the oleo strut hanging down."

Mr. Lemkuhl again stated in redirect examination (R. 596):

"Q. Before the landing gear gets over the landing platform, is there any necessity for the man to go under the plane?

A. No, sir. I wouldn't permit it."

Mr. Holbrook, another expert called by Jones Stevedoring Company, testified as follows (R. 613):

"Q. Is there ever any necessity for holding onto it before it arrives at the platform?

A. No, because you have to hold with the tag lines until it reaches——"

Mr. Holbrook again stated on cross-examination (R. 619):

"Q. Until the landing gear of the plane arrives—to please Mr. Kay, I will say within the square footage of the platform, that is, within that area directly above the platform—is it necessary for a man to go underneath that airplane and hold on to that landing gear until that time?

A. No, not until——

Q. It is not?

A. Not until it is over the platform, no."

From this testimony, which was never directly contradicted, it can be seen that it was unnecessary for

Mr. Luehr to be under the airplane at that time, when there were still operations to be performed by the derrick in moving it to a place over the platforms. It is clear that the job of steadying the plane could have been done effectively by placing his hands on the wing at shoulder height, and that it was not necessary to place himself in a position of danger to do his job.

The law is clear that where there is a safe way to do a job and a dangerous way, and the man chooses a dangerous way, his act is negligent. *Larsson v. Coastwise Line* (9 C.C.A. 1950) 181 F. (2d) 6. The rule is stated in 65 *C.J.S.* Section 122, page 732, as follows:

> "One having a choice between two courses of conduct is contributorily negligent in pursuing a course which is dangerous rather than one which is safe, where an ordinarily prudent person would not have so chosen."

In *Uzich v. E. & G. Brooke Iron Co.* (D.C.E.D. Pa. 1947), 76 F. Supp. 788, a steeplejack painter was held contributorily negligent in grasping a cable for the purpose of moving around the cable, with the result that his hand was injured when the cable began to move. Evidence indicated he could have gone around the cable in a safer manner. The Court stated at page 789:

> "Of course there was no absolutely safe way to do plaintiff's job. * * * However, he could have done it without the slightest risk of being injured in the way he was. The choice was between an

> at least comparatively safe way, and one that was highly dangerous."

The fact that there was a comparatively safe way to do the job of steadying the plane is evidenced by the fact that there were other men doing the identical job in a different manner (i.e., holding onto wings and staying out from under the plane) and were not hurt by the plane's fall.

The doctrine was recently applied in the Northern District of California, Southern Division in *McKenney v. U. S.* (D.C. N.D. Cal. S.D. 1951), 99 F. Supp. 121. In that case libelant was in charge of a lifeboat drill and during the time the boat was being lowered to the water he chose to stand on the stern thwart instead of standing in the bottom of the lifeboat or sitting on the thwart. The boat was dropped to the water through the negligence of the boatswain in tripping a releasing gear. The Court stated, at page 124:

> "Since none of the other occupants of the lifeboat * * * suffered anything but minor injuries, it seems evident that the libelant could have placed himself in a safer position."

The Court went on to reduce the award 50% by reason of libelant's negligence.

The negligence of Mr. Luehr himself is enough to bring the hold-harmless clause of the contract between Jones and the Government into operation, for the contract specifically provides that Jones will hold the Government harmless for any bodily injury caused

in whole or in part by any *employee of* Jones. The negligence of Luehr also deprives the Stevedore of the contractual exemption from its general liability, for the negligence of Luehr, its employee, obviates the possibility that the accident was caused "solely" by an act or omission of the Government or its employees.

In addition, there is the negligence of the Jones' foreman, or walking boss, in having Mr. Luehr ordered up to the mechano deck and in failing to warn him to get away from his position of danger partially under the airplane, when he knew that the load was to be moved. Mr. Spirz, the walking boss, testified that not only did he fail to warn Mr. Luehr not to go under the plane, but that he approved of his presence there. Mr. Spirz testified (R. 124): "If he can reach, when he can reach the plane, then it is permissible to get under it."

In *Barbarino v. Stanhope S.S. Co.* (C.A. 2d 1945), 151 F. (2d) 553, the Court of Appeals reversed a District Court decree, dismissing the petition impleading a stevedore in a case where a longshoreman was injured by a boom falling by reason of a defective bolt and the shipowner sought to hold the stevedore for negligence of its foreman in permitting libelant to expose himself to the dangerous situation. Judge L. Hand said (page 555):

> "It was possible to avoid all danger at that time by merely warning the men to get out of the way. It is true that it is most uncommon for

> a boom to fall; but it was not unknown, and it would not have delayed the work for more than a few seconds to give the necessary warning and to see that it was obeyed. Considering that if it did fall, the men would be most gravely injured or killed, we cannot excuse the failure to protect them by so simple a means."

It was the duty of Mr. Spirz, as a walking boss of the stevedore gang, to look after the safety of his men. (R. 129.)

There is, therefore, the negligent commission of an act by an employee of Jones (Luehr) and the negligent act of omission (in failing to warn, instruct or prohibit) by an agent of Jones (Spirz). The burden of proof is upon the Stevedore to show why they did not use due care to avoid exposing its men to dangerous conditions. *Pan Am. Petroleum Co. v. Robins Dry Dock & R. Co.* (2nd Circuit 1922), 281 Fed. 97, 109. This burden they have not met.

Not only does the law put the burden of showing the absence of negligence upon the Stevedore, but the terms of the contract also emphasize that it was the intention of the contracting parties that the Stevedore was to be liable for personal injuries occasioned during the work under the contract with few specific exceptions.

Article 14(a) 2, states in the final sentence—"The general liability and responsibility of the contractor under this clause are subject *only* to the following specific limitations. * * * b(2) If the damage, injury

or death resulted solely from an act or omision of the Government or its employees * * *."

It is plain to see that under this contract the general liability for personal injury lay with the Stevedore; therefore, to escape such liability they must prove that the injury was caused solely by negligence of a Government employee.

It is to be remembered that the Stevedore was in sole and exclusive control of this loading operation. The barge foreman, who was a Government employee, took his directions from the Stevedore walking boss and relayed them to the crane operator. The Stevedore and the Stevedore alone had the responsibility for the safety of its men. The terms of the contract provide that in the event of bodily injury the Stevedore shall be held liable unless entirely free from negligence. In light of the clear and convincing evidence that Luehr was allowed to be under a suspended load in violation of the express terms of the stevedore's own Safety Code, it cannot be said that the Jones Stevedoring Company has successfully carried the burden of showing absence of negligence on their part.

It is therefore respectfully submitted that the hold-harmless clause of the contract must be adhered to, and the Jones Stevedoring Company be required to indemnify the Government. There is no inequity in requiring Jones Stevedoring Company to bear full liability for partial fault in accordance with the terms of the contract. The terms of the contract are not severe in light of the insurance provisions and the background.

The case of *American Stevedores, Inc. v. Porello* (1946), 330 U.S. 446, 91 L. ed. 1011, 1947 A.M.C. 349, involved a similar situation wherein the parties to the action had the same relationship to one another that the parties have here. In the *Porello* case, the contract between the Stevedore and the Government provided (page 457):

> "The Stevedore * * * shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing same * * * through negligence or fault of the Stevedore, his employees, and servants."

The Supreme Court found this clause ambiguous and subject to three interpretations. (1) The Stevedore should indemnify the United States for damages solely caused by the Stevedore's negligence; (2) the Stevedore should indemnify the United States for damage caused in any part by Stevedore negligence; and (3) the Stevedore, in the case of joint negligence, should be responsible for that portion of the damages which its fault bore to the total fault. On remand to the District Court the District Judge held the contract to require full indemnity to the United States in a situation of joint negligence (1950 A.M.C. 2071), but to avoid any such difficulty in the future, the standard form of contract was amended. The present contract is clear that the Stevedore agrees to be fully liable for injury caused "in whole or in part" by the negligence of its employees.

The contract in this case provides that the Stevedore shall carry bodily injury liability insurance, and

such insurance was carried by Jones (Government's Exhibit B, Sec. 14(c)). (R. 546.)

This contract contemplates that the Stevedore is to perform the stevedoring operation as an independent contractor thereby avoiding the Government's invasion of the stevedoring field, and leaving the work to private enterprise. In so doing, the Stevedore is given the most advantageous contract possible, and to eliminate duplication of expensive equipment the Government agrees to loan to the Stevedore, free of charge, a heavy lift floating crane and operator for it. (Government's Exhibit B, Article 1(h)1.)

In addition, the Government requires that the Stevedore carry compensation insurance and liability insurance. The Government then allows the cost of the insurance to be calculated in the costs upon which the Government gives the Stevedore an over-riding percentage. This arrangement results in the Government indirectly paying the premium on the insurance. Testimony of Mr. Elzey, Assistant Chief of the Procurement Division, San Francisco Port of Embarkation, covered this point as follows:

> "Mr. Harrison. Q. Mr. Elzey, do you have anything to do with the computation of rates that are paid under this contract?
>
> A. Yes, Mr. Higbee does the negotiation, and when he has arranged the negotiation and determined the rates, I actually compute the rates.
>
> Q. How are the rates computed, Mr. Elzey?
>
> A. The contract provides for payment to the stevedoring contractor on what we call a commodity basis?

The Court. Commodity basis?

A. Commodity basis.

The Court. What do you mean by commodity basis?

A. We pay the contractor so much per ton for loading different classes of cargo.

The Court. I see.

A. And tonnage rates are arrived at by determining the cost of a longshore gang for one hour; and to this direct cost is added an over-riding percentage to compensate the contractor for his expenses, plus an allowance for profit.

Mr. Harrison. Q. Then, in effect, it is a—although not technically a cost-plus contract, in effect is amounts to that, is that right?

A. That is what it is. Pay the contractor's expenses plus a certain amount for profit, yes.

Q. I see. Now, you say that you do work in computing these costs, is that right?

A. Compute contract rates, yes.

Q. In these costs, is there included cost of insurance covering the Stevedore's operations?

A. In the over-riding percentage there is an allowance for what is known as payroll insurance, which is the workmen's Compensation Insurance—State, and Workmen's Compensation Insurance—Federal.

Q. So that, in effect, Mr. Elzey, the Government who pays Jones Stevedoring Company under this contract—in effect pays the premiums on that insurance, is that correct?

A. They pay the stevedore contractor money with which him to pay the premium, yes, sir."

(R. 543, 545.)

Since the Government pays the premium on the insurance covering accidents occasioned during these stevedore operations, naturally the Government wishes to be protected also. This is done by the proviso in the contract with the Stevedore that the Stevedore must indemnify the United States for any liability occasioned during the stevedoring operation, in whole or in part, through the negligence of the Stevedore employees.

The Government is paying for the contractor's insurance, and there is nothing inequitable in requiring that the insurance inure to the benefit of the Government by way of indemnity-over from the Stevedore, which presumably can collect from the insurer.

The findings of the District Court that there was no negligence of the Stevedore are clearly erroneous and should be disregarded.

The findings of the District Court that the Stevedoring Company was not guilty of any negligence is not strictly a finding of fact which this Court must adhere to unless clearly erroneous. The finding involves not necessarily a fact, but is a conclusion of law regarding the standard of care required by the stevedores for the protection of their men. Appellate Courts sitting in admiralty have found such findings clearly reversible. See *Barbarino v. Stanhope SS Co.* (2nd Cir., 1945), 151 Fed. (2d) at page 555, wherein the Court stated:

> "It is true that in a jury trial the standard of care demanded in any given situation is regarded as a question of fact, and the verdict is

> conclusive upon it as it is upon any other question. For the jury is deemed—rightly or wrongly —to be as well qualified to set such a standard as a judge. But where the decision is that of a judge, we distinguish between such findings and true findings of fact; and the conclusion is as freely reviewable as any 'conclusion of law', strictly so called." (Citing cases.)

In addition it is to be noted that in neither the case of Luehr against the United States nor the case on the impleading petition did the judge himself make findings of fact and conclusions of law. In each case the findings and conclusions prepared by successful counsel were adopted bodily by the Court. Indeed, in the case on the impleading petition they appear in the record with caption, "Findings of Fact and Conclusions of Law submitted by Jones Stevedoring Company, respondent-impleaded" (R. 50).

It is elementary that where the trial judge does not make findings of his own, using the proposals of counsel for both parties as a guide to assist him in reaching his own decision, but merely accepts the findings prepared by successful counsel, the Appellate Court should not treat such purported findings as entitled to weight given findings made by the trial judge himself; e.g., *The Severance* (4th Cir., 1945), 152 F. (2d) 916-918 (Citing cases).

But in any event, we believe that, as shown herein, the purported findings found in the record at bar are clearly erroneous and contrary to the evidence insofar as they purport to hold that the employees of Jones

were free from negligence, which was a contributing cause of Mr. Luehr's injury.

It is respectfully submitted that Luehr was negligent in placing himself in a position of danger under the airplane when the job of steadying the plane could have and should have been done safely by placing his hands upon the wing. In addition, Jones' foreman was negligent in not warning Luehr to get out from under the plane when he knew the plane was about to be moved, and should have known, as an experienced stevedore, that in moving a load there is always the possibility of the load falling.

By reason of this negligence, the Jones Stevedoring Company is liable to indemnify the United States under the terms of the contract.

THE SUMS ALREADY PAID BY WAY OF COMPENSATION AND MEDICAL EXPENSES MUST BE CREDITED TO ANY AWARD TO THE LIBELANT.

In accordance with provision 14(c) of the contract between Jones and the Government, Jones obtained and carried Workmen's Compensation Insurance and Harbor Workmen's Compensation Insurance. The policies provide:

> "Anything in the policy to the contrary notwithstanding, it is understood and agreed that the company waives all right of subrogation against the United States of America that it might have by reason of payment under this policy." (Gov. Exs. C and D, R. 551, 552.)

In accordance with the provisions of the Longshoremen's and Harbor Workers' Act (33 U.S.C. 904), Jones, the employer of Luehr, became liable to pay compensation and medical expenses arising from the injury to Mr. Luehr. The primary liability for these payments lay with the employer, Jones.

Prior to the trial in the District Court, Mr. Luehr received $3,082.20. This was given to him by payments of approximately $33.00 a week. Mr. Luehr never reduced his claim to an award before the Compensation Commission, nor did he ever file formal notice of intention to sue a third party.

In addition to the compensation, medical expenses incurred by Mr. Luehr were paid in the sum of $7,322.32.

Although the District Court did not enumerate any separate items of damage in the findings, it was recited that the $125,000.00 included all of Luehr's general and special damages. (Finding XV in Findings covering case libel of Luehr v. United States.) (R. 68-69.) As a consequence, the sum of $125,000.00 includes the special damage of hospital expenses which have already been paid to Luehr by the employer, Jones.

In addition, the $125,000.00 includes loss of wages to the time of the trial, a portion of which Luehr has already received in the form of compensation in the amount of $3,082.20.

In the absence of any specific provision to the contrary, these items would be proper items of damage

against a third party, because the employer Jones could demand and receive from the injured party, repayment of these amounts out of the judgment against the third party. Under the ordinary situation, then, the third party pays these items of damage to the injured man, who in turn pays them over to his employer. In other words, the employer recovers his compensation payments through the employee's suit against the third party.

But in the instant case the employer has expressly waived its right to recover these payments from the particular third party, the United States. To allow the libelant to recover these two items of special damages in full from the United States, and thus in turn entitle the employer to recover from the libelant the sum paid to him, amounts to a circuitous way of violating the anti-subrogation agreement.

The United States has protected itself from liability for amounts Jones might pay by way of compensation by the express terms of the insurance policies required under the contract with Jones. These express terms must be respected. The judgment against the United States should be reduced by the amounts paid by way of compensation and medical expenses, i.e., $10,404.52.

In the case of *Palardy v. United States,* 102 F. Supp. 534, decided January 21, 1952, in the Eastern District of Pennsylvania, this identical question was presented and Circuit Judge Kalodner correctly credited to the judgment awarded in that case, the amounts paid by way of compensation, stating:

"Accordingly, I have found that libellant suffered damages compensable by the sum of $18,000. This figure has been reduced 25% or $4,500.00 because of libellant's contributory negligence, leaving him an award of $13,500. Since libellant has already received the sum of $325.00 representing payment voluntarily made by Luckenbach's compensation carrier under the Longshoremen's Act, I have reduced the award by this amount to $13,175.00. However, while I have credited this amount to the decree against the original respondents, I am making no affirmative decree in favor of Luckenbach, as the latter has expressly waived its rights against respondent as subrogee, under Section 33 of the Act. I have not allowed recovery of the $439.35 medical expenses, since they were paid by Luckenbach's insurance carrier."

It is respectfully submitted that the District Court erred in failing to credit to the award against the original respondent the sum of $10,404.52.

It follows, of course, that a finding that the United States is entitled to indemnity from Jones, would necessitate an identical reduction of the judgment in the amount already paid by Jones.

THE AWARD OF DAMAGES IS GROSSLY EXCESSIVE.

The District Court awarded to libelant the lump sum of $125,000.00 to cover both special and general damages. (Findings in Luehr v. United States, No. XV.) (R. 68, 69.) The Court did not determine any

separate items of damage. This figure does not appear warranted under the facts.

Mr. Luehr was born March 11, 1899. (R. 284.) He was 53 years old at the time of the trial in March of 1952. He could reasonably have anticipated remaining actively engaged in stevedoring work until approximately age 65. He himself testified to that effect. (R. 336.) By reason of the accident he will lose earnings during the remaining 12 years of his working expectancy. This method of determining the time over which the loss of future earnings is to be computed is the most logical, and is the accepted practice. The Circuit Court opinion in *Porello v. United States* (2d Cir.), 153 F. (2d) 605, at page 608, which concerned a stevedore injured at the age of *52,* states with regard to the District Court opinion allowing loss of earnings for full life expectancy as follows:

> "On the other hand capitalization at 2½% for 17 years was too favorable to the libelant both in respect to the rate and the number of years he could continue to do the heavy work of a stevedore. If we took an annual loss of $1275 (75% of $1700) capitalized at 3% for *ten* years, the present value of future loss of earnings would be $11.200." (Italics ours.)

This Court, therefore, felt that the stevedore's working expectancy ended at age 62.

See also *Brenton v. United States* (D.C. E.D. N.Y., 1949), 1949 A.M.C. 1812, wherein the Commissioner states:

> "A fisherman who was killed when he was 51 years old was entitled to his earnings for an expectancy of approximately 15 years."

Gell v. United States (D.C. S.D. N.Y., 1949), 85 F. Supp. 717, 1949 A.M.C. 1719, involved a stevedore killed at 49. In computing loss of expected earnings, the Court stated:

> "* * * it is unlikely that deceased would continue the heavy work of a stevedore after he was 65."

Also in *Johannsson v. United States* (D.C. E.D. N.Y., 1949), 1949 A.M.C. 1802, involving the master of a fishing trawler who was permanently disabled, the Commissioner found:

> "* * * libelant could not have reasonably expected to have worked as the master of a fishing trawler beyond the age of 65.
>
> I therefore find that at the time of the trial he had probable expectancy of a working life in his former employment of 25 years. It is probable future earnings should be capitalized at 3% for 25 years."

The accepted method of estimating future loss of earnings is to examine earnings the past years and average them out. In 1948 Luehr earned $3,063.57. (R. 286.) In 1949 he earned $4,252.07. (R. 287.) His earnings in 1950 up to the time of the accident were approximately $54.00 a week ($1,548.00 divided by 29 weeks). (R. 288.) In fact, Luehr's own union reported to the compensation commissioner that his average earnings were only $49.00 a week, and as a

consequence the compensation payments were reduced from the maximum of $35.00 a week to $33.32 a week. (Resp. U.S.A. Ex. E, R. 333.) If he had continued to work at the rate of $54 a week he would have earned $2,808 in 1950. In the year 1950 he did not work all the available port hours during the time that he worked, so the computation introduced by counsel for libelant, of what a man would have earned had he worked all the available hours, is irrelevant.

For the three years 1948, 1949 and 1950, Luehr's average earnings may be said to be approximately $3,400.00 a year.

Mr. Luehr is not totally disabled, and it is reasonable to assume that with personal diligence he could earn a minimum of $500.00 a year. Dr. Keene Haldeman testified that he believed Mr. Luehr could eventually do some sort of sedentary work. (R. 423, 424.) Dr. Walker also testified that Mr. Luehr could do some sort of "sedentary type work". (R. 405.)

This would give him an average expected loss of earnings of approximately $2,900.00 a year.

Capitalized at 3% for 12 years equals $18,966.00.

When computed on the average loss of earnings of $3,600.00, which is the most favorable possible view under the facts, the loss of earnings for 12 years capitalized at 3% equals $24,134.40. This would require that no deduction be made for income tax and the assumption that Luehr is totally, permanently

disabled, and will never make another dollar, and that his earnings would have increased in future years. These assumptions are not justified, especially in view of the doctors' prognosis.

Without regard to the compensation he has received, his loss of earnings to the time of the trial amounted to between $49.00 a week and $54.00 a week for 20 months. Mr. Luehr was married and entitled to take his wife as an exemption on his income tax. This would have given him a take-home pay in the sum of approximately $190.00 a month. In 20 months his loss would be $3,800.00.

As previously pointed out, this figure should be reduced by the sum of $3,022.20, which he received by way of compensation, but for the purpose of showing the excessiveness of the award in the District Court, this will not be considered here.

The total medical expenses to the time of the trial were $7,322.32. The major surgery and hospital care has already been taken care of. The future hospital care should not exceed $2,000. (R. 398, also R. 403.)

Consequently, it can be seen that the total amount of these estimable damages could not exceed $35,000 to $40,000.

This means that the remaining $85,000 to $90,000 were awarded to compensate for pain and suffering.

Admittedly, Mr. Luehr suffered severe discomfort by reason of his injury, but such a monetary award to cover pain is unreasonable and unprecedented.

Mr. Luehr's injuries are set out in medical detail in the Findings of Fact. (R. 64.) They are listed as follows:

1. Compression fracture of the first lumbar vertebra, with marked displacement posteriorally and anterior wedging.

2. Fracture of the neural arch of the first lumbar vertebra.

3. Fracture of several transverse processes and lamina of the vertebra.

4. Derangement of the lumbar-sacral joint, with a complete collapse of the fifth lumbar interspace.

5. Injury to several of the intervertebral discs in the lumbar spinal area.

6. Contusion of the spinal cord, and scar tissue in the cord.

7. A mesenteric thrombosis, resulting in a paralytic ilias, or paralysis of the bowel.

8. Thrombo phlebitis of both legs.

9. Oblique fracture of the left clavicle.

10. Fracture of at least six ribs and a tremendous concussion injury of the entire chest.

11. A compound comminuted fracture of the left tibia, with removal of the anterior cortex, and osteomyelitis.

12. Fracture of the left fibula at both the upper and lower ends.

13. Avulsion fracture of the right astragalus.

Although the list of these injuries is impressive, it is to be noted that Mr. Luehr testified that he did not have a great deal of pain while he was in the hospital. (R. 299.) This period consisted of 100 days. Although there were thirteen separate injuries listed, five of them were completely overcome, or substantially mended during this period, in which Mr. Luehr states he did not suffer a great deal of pain. The mesenteric thrombosis, resulting in a paralytic bowel, was completely subsided. (R. 365.) The thrombophlebitis of both legs subsided. The fracture of the left clavicle and fractures of the ribs, the fracture of the transverse processes and the avulsion fracture of the right astragalus, being all simple fractures, healed during that period. Mr. Luehr testified that he had no pain in his shoulder as a result of the clavicle fracture. (R. 301.)

There remained unhealed the fracture of the vertebra. This allegedly subsequently caused Luehr to suffer pains in his left hip; however, he testified that during the first 100 days in the hospital he had no pain in his hips. (R. 299.)

There also remained unhealed the compound fracture of the tibia and fractures of the fibula of the left leg. In this regard Mr. Luehr testified that he did not have a great deal of pain in his leg. (R. 301.)

At the time of the trial, Mr. Luehr testified that his only complaints were pain in his back, left hip, running down below the knee (R. 306), and that his right ankle was sore when he walked (R. 310).

With regard to future pain in his back, Dr. Walker testified that at the time of the trial, nature had fused the displaced vertebra about 50%. (R. 400.) He further testified that he would advise performance of a back fusion operation which would complete the union and "should take quite a bit of pain out of his joints, should prevent further calcification and demineralization, some of which has occurred. I expect it to stiffen his spine, but it will be comfortable and will be painless." (R. 402.)

Dr. Haldeman testified, "I would expect a progressive improvement in the back pain, and it may be entirely relieved by time." (R. 424.)

In the findings presented by counsel for Mr. Luehr, they list as a permanent disability, in addition to the back injury above mentioned, osteomyelitis of the left leg. In this regard, Dr. Walker testified (R. 399), when asked if he expected the infection to clear up: "We expect it to. It is down so much in quantity that we hope it will clear up. There is no guarantee that it will, but expectations from the history, his general condition, all indicate this will clear up."

With regard to the fracture of the left tibia, Dr. Walker testified it had united in "fairly straight, firm, solid leg" (R. 379); and further stated that clinically, the leg has healed very firm (R. 382). With regard to the fracture of the left fibula, which libelant's findings listed as the eighth permanent disability, Dr. Walker testified that it resulted in no permanent disability (R. 382) and was "unimportant".

With regard to the traumatic arthritis of the left hip, which the findings list as the fifth permanent disability, Dr. Walker testified that this was caused by "post-traumatic regressive change" which "may clear up and it may stay right where it is". He agreed that it may get better, and stated "but most of the time they lose the pain". (R. 394-395.) Dr. Haldeman said he saw no significant difference in X-rays of right and left hip other than slight decalcification of left hip. (R. 446-447.) Dr. Haldeman further testified that the pain in the left hip may be relieved by the use of an elevated heel on the left shoe to more nearly equalize the length of the legs. This elevation need not be over ½ inch. This would also alleviate any difficulty occasioned by the shortening of the left leg some ¾ of an inch. (R. 422.)

With regard to the traumatic arthritis of the right ankle, listed in the findings as the sixth permanent disability, Dr. Haldeman's examination indicated the fracture was fully healed. (R. 420.) Although listed as a permanent disability in the findings, Dr. Haldeman testified Luehr made no complaint about the right ankle at the time he appeared for examination. (R. 444-445.)

With regard to the rib fractures, Dr. Walker testified that they are completely healed, and no disability can be expected from the ribs as such. (R. 370.) Luehr made no complaint about his ribs to Dr. Haldeman. (R. 420.)

Consequently, it can be seen that the only disabilities which can be described accurately as permanent

are those listed in the findings as "extensive spinal disability" (Finding XI, Injury 1) and "spinal cord injury resulting in scar tissue in spinal cord which has left spinal cord in a permanently damaged condition." (R. 66.)

As to the "serious and extensive spinal disability", the only reference that is found in the record is the statement of Dr. Walker that the back fusion will "stiffen his spine but will be comfortable and painless". (R. 402.)

The scar tissue in the spinal cord apparently does not cause any symptoms of which Mr. Luehr complained. The injury to the cord apparently caused a temporary paralysis of the bowel and a masenteric thrombosis, but these symptoms were overcome in the hospital, and nowhere in the record is there any reference to their possible re-occurrence.

In summary, it appears at the time of the trial that Mr. Luehr was suffering from a compressed fracture of the first lumbar vertebra, which caused him pain and limited his motion, a ¾ inch shortening of the left leg, and pain in right ankle when he walked. It was the testimony of the doctors that the pain from the back would be relieved either by a surgical fusion or by time. The pain in his left hip should also be relieved by the operation. If the pain in the left hip arose as a consequence of the shortening of the left leg, Dr. Haldeman testified it would be alleviated by the wearing of an elevated left heel on his shoe.

This man is not bedridden, he has no paralysis, nor is he entirely disabled from work. The prognosis on each of his pain producing disabilities was favorable.

A review of recent Federal decisions discloses no cases where an award of this magnitude was made in similar circumstances. A very similar case was decided in the District Court for the Eastern District of New York on January 26, 1950 (*McCarty v. United States,* 88 F. Supp. 251). In that case the injured man was 49 years old. His injuries were described by the Court at page 257 as follows:

> "He suffered fractures of the left leg, right shoulder, right leg, spine and ribs." (Virtually identical with those of Mr. Luehr.)
>
> "These proved partially disabling, and were of course the source of pain and suffering; the healing of the fractures has left him subject to restrictions of movement and function. He cannot resume his occupation as a longshoreman. His earning capacity has not been destroyed, but it has been impaired, and while re-employment in another calling is highly desirable for his own sake at least, it may not be easy of accomplishment, since he is 49 years of age.
>
His loss of wages at $70 per week from the date of the accident to the trial is computed at	$8,700.00
Medical and hospital expenses incurred and to be reimbursed	1,041.00
	$ 9,741.00
For the injuries themselves and loss of earning capacity, a just award is thought to be	$25,000.00
Total	$34,741.00"

That case involved a man who earned more than Mr. Luehr and had four years more working expectancy, and suffered virtually the same disabilities. Admittedly the size of the hospital bill shows that his recovery was not so involved as Mr. Luehr's, but the Court found a just award to be virtually $90,000.00 less.

See also *Badalamenti v. United States,* 67 Fed. Supp. 575 (D.C. E.D. N.Y. 1946) (affirmed in part and reversed in part, 160 F. (2d) 422) where a 35 year old stevedore received $52,000.00 for injuries, including severe cerebral concussion, fractured jaw and femur, making it impossible for him to ever resume his work as a longshoreman, and necessitating in excess of $4,000.00 for hospital and medical expenses.

See *Denny v. Montour R. Co.,* 101 F. Supp. 735, decided in the Western District of Pennsylvania on December 7, 1951, a 40 year old plaintiff who was completely and permanently disabled, who had been earning $300.00 per month, and at the time of the trial had lost twenty-two months wages of $6,600.00, the Court found an award of $80,000.00 to be reasonable. In the course of the opinion the Court stated at page 743:

> "Since the accident the plaintiff has been severely crippled, ridden with constant pain, unable to work and compelled to wear an uncomfortable brace and to sleep, when sleep comes upon him, in a plaster cast. He has been rendered incapable of moving about in a normal manner, being forced to walk in an ungainly

fashion, throwing his body and limbs about and attracting the pitying attention of those who see him. He will require further medical care and attention, and it is extremely improbable that he will ever again be able to engage in a gainful occupation. Plaintiff's life will always be one filled with pain, suffering and inconvenience. In short, he is and will be a truthfully pitiful figure of a man."

Two other awards for very serious injuries, made by Judge Goodman of the same Northern District of California, Southern Division, bear comparison. In the case of *Wibye v. United States* (D.C. N.D. Cal. S.D. 1949), 87 F. Supp. 830, the award to two seriously injured brothers was made as follows at page 833:

"As a result of the accident, plaintiff Harold Wibye shuffered a cerebral concussion resulting in loss of vision in his left eye and severe headaches, wrenching of the neck and upper back, with post traumatic parascapular myositis bilaterally, and other lacerations abrasions and nervous shock. As the evidence showed, he was unable to follow any occupation for the 141 weeks between the accident and the trial. Medical testimony was that he would need further hospitalization for treatment of his neck and that further repairs to his knee, which had been severely lacerated, were required. The medical proof further showed that the injuries are of a permanent nature and that Harold Wibye will never be fit to follow his occupation. He was 40 years of age, and a superintendent of building construction, earning approximately $125.00 per week at

the time of the accident. Lost earnings amount to some $17,625.00 and medical and hospital expenses were approximately $2,160.00. After taking into account the nature of the injuries, the age of this plaintiff, his reasonable life expectancy, his lost earnings and medical expenses and the present value of his future loss of earnings, I have concluded that a proper award would be the sum of $45,000.00."

"Niels K. Wibye suffered more severe injuries than his brother. He also had a cerebral concussion and in addition a fracture of both hips and his right knee, resulting in considerable limitation of motion thereof. In addition, he suffered injury of the tendons of the right wrist and other deep and painful lacerations. He was confined to the hospital for many months, where he underwent surgery in an attempt to repair the fractures of the hips and knee. His injuries are permanent in character. At the time of the accident, he was 41 years of age, and was a carpenter foreman, earning approximately $100.00 a week. Loss of earnings at the time of the trial was $14,000.00; medical and hospital expenses amounted to $4,505.56. Taking into account his age, occupation, lost earnings, medical expenses, present value of his future loss of earnings, his reasonable life expectancy, and the nature of his injuries, my finding is that an award of $60,000.00 would be proper."

These awards involved younger men with longer working expectancy, who also suffered injuries which permanently disabled them from returning to their occupations. At the time of the trial they had lost

wages for 141 weeks as compared to Luehr's loss of 80 weeks, and yet the largest award was less than half of that given to Mr. Luehr.

Mack v. United States, 105 F. Supp. 149, is another recent case decided May 12, 1952 in the District Court for the District of Massachusetts. In that case a ship's rigger was injured in the leg and the injury resulted in permanent total disability. The man was fourteen years younger than Luehr at the time of his injury, and earned $20 a month more than Luehr. His condition after treatment was in some ways similar to that of Mr. Luehr. It was described as follows at page 151:

> "* * * he has suffered pain and swelling almost constantly. He has been and is still unable to stand for extended periods of time because of swollen painful extremities. He is unable to walk any appreciable distances."

The prognosis was worse than that of Luehr, for the Court further stated:

> "He has reached an end result, is not employable and is permanently and totally disabled. The prognosis is, as one medical expert aptly described it 'dark' ".

Under these facts an award of $85,000 was given. It is obvious that with 14 years more working expectancy than Mr. Luehr, and considerable greater earning capacity, the award included more than twice the amount of loss of future wages, and yet it still was $40,000 less than the one under consideration.

The cases are very numerous wherein men with considerably more earning power, and many years more of working expectancy, have been totally and painfully disabled, and the awards are considerably less. Without burdening this Court with excessive citations, the following are mentioned briefly. The citations are limited to recent cases in order to eliminate any discrepancy between the purchasing power of the dollar at the time of the award and the purchasing power at the time of Mr. Luehr's award.

Lewis v. Pennsylvania R. Co. (E.D. Pa. 1951), 100 F. Supp. 291, involved a 34-year-old locomotive fireman having an earning capacity of $395.00 a month (compared to Luehr's $220.00) and a working expectancy of 31 years (compared to Luehr's 12 years), who was awarded $60,270 for rupture of intervertebral disc resulting in total disability up to time of trial, and possibly permanent total disability.

A larger award ($150,000.00) was sustained as reasonable in *Trowbridge v. Abrasive Co. of Philadelphia,* (3rd Cir. 1951), 190 F. (2d) 825, by Circuit Judge Staley in the Third Circuit, but it is important to note that the plaintiff in that case was a machinist with nine years more working expectancy than Luehr. Although no earnings are given for Trowbridge in the opinion of the Court, it can be reasonably assumed that a skilled machinist wage was considerably above that of Mr. Luehr. In addition, the $150,000 included $23,817.76 for hospital expense and compensation paid and repayable.

Stokes v. U. S. (D.C. S.D. N.Y. 1944), 55 F. Supp. 56, (damages affirmed, 2nd Cir. 1944), 144 F. (2d) 82, involved an injury to a marine engineer and as a result he had three operations to his leg and was in hospitals a total of 274 days. At the time of the trial he had an arrested case of osteomyelitis. The Court stated, at page 58:

> "He will never have a firm union of the bones of the right leg. He cannot bear his weight on it. A supporting brace and a cane or a crutch will help him get about haltingly. The alternative is amputation and an artificial leg from some point below the knee. Libelant is permanently disabled and barred from following his trade as a marine engineer."

The Court of Appeals found that $7,500.00 was a reasonable award for the pain and suffering (144 F. (2d) at page 87). This emphasizes that the award in this case of between $85,000 to $90,000 for pain and suffering is grossly excessive.

In *Johannsson v. U. S. A.,* 1949 A.M.C. 1802 (supra), involving a man who suffered an amputated left leg, the commissioner found that $15,000 was reasonable compensation for pain and suffering, past and future. In this regard, he stated:

> "The evidence establishes beyond any doubt that libellant Johannsson suffered intense agony from the time of the accident on October 21, 1945, until he was discharged from the hospital on April 16, 1946, nearly six months, and that after undergoing five operations, of which three at least were very serious, he is still suffering and

> may always have some pain, real or 'phantom'. It has been repeatedly said in the decisions that it is difficult to measure the value of pain and suffering in money. It is unnecessary to recite here the convincing testimony which libellant gave as to the intensity and extent of his suffering. Respondent's counsel does not deny that he suffered and concedes that libellant 'has been through a lot'. I can only weigh what he testified to and his apppearance when he testified before me to reach a conclusion as to what he should receive. After giving careful consideration to these factors and to the medical evidence, I find that $15,000 for his past and future pain will be fair compensation."

It is respectfully submitted that in light of Mr. Luehr's past earnings, his working expectancy, the nature of his injuries, and the extent to which he had recovered at the time of the trial, the award of $125,000.00 is grossly excessive.

This Honorable Court very recently had before it a case involving an award of $100,000.00 to a railroadman who lost the lower portion of his right leg in an accident. *Southern Pacific Co. v. Guthrie* (9th Cir. 1949), 180 F. (2d) 295, rehearing reported 186 F. (2d) 926. In that case the Court stated, at page 928:

> "Under the circumstances, we cannot assume that the trial court was wrong in stating that the figure (loss of earnings) exceeded $60,000.00.
>
> "It thus appears that the jury must be held to have awarded some $40,000 for the non-pecu-

> niary damage. With respect to that award the members of this Court as now constituted are in agreement, as was the Court on the former hearing on two preliminary conclusions.
>
> "The first of these is that the verdict was too high."

The Court then went on to review its power to reduce the verdict. The majority found there was no power to do so in the circumstances of that case. Chief Justice Denman, Justice Stephens and Justice Mathews dissenting.

There is no question in the present case of what the Court can do about it, should it conclude the judgment is excessive, since this is an appeal in admiralty. The United States Supreme Court passed on this question in *Brooklyn Eastern District Terminal v. United States* (1932), 287 U.S. 170, 53 S. Ct. 103, 77 L.ed. 240. The Court said:

> "In admiralty an appeal to the Court of Appeals is deemed to be a trial de novo (citing cases). An assessment of damages may be corrected if erroneous in point of law, but also it may be corrected if extravagant in fact."

In Chief Justice Denman's dissenting opinion in *Southern Pacific Co. v. Guthrie* (supra), in discussing the award of $40,000 for pain and suffering for the loss of a leg below the knee, he stated, at page 933:

> "That the amount is substantially more than appellant should pay we are agreed. * * * To me it seems no exaggeration to apply the term 'monstrous' to such a concept of American justice."

The pain and suffering which Guthrie suffered in the cited case, as a result of a train amputating his right leg below the knee, was described by the Court in the earlier hearing as follows (180 F. (2d) 295 at page 303):

> "The evidence as to these factors was that Guthrie was hospitalized for 37 days during which he underwent two operations on his stump. In the process of healing a 27 degree contracture of the right thigh developed, so that the stump of his leg extended at an angle which up to the time of trial had prevented him from wearing an artificial limb, and it appeared possible that he would never be able to wear one. He suffered from phantom pain in the cut limb, there was tenderness over the cut end of the sciatic nerve, and the medical testimony was that this phantom pain, a continued constant burning sensation as if he felt his amputated foot, was characteristic of amputees generally, and was real pain, often remaining constant and permanent. Loss of the leg has increased his discomfort in his back, due to a congenital anomaly which previously existed there.
>
> "It is common knowledge that for a man of Guthrie's age, aches and pains arising out of physical disabilities do not ordinarily lessen, as they might for a younger man. We do not think it necessary to determine whether the probability of future suffering was proven with the requisite degree of certainty. On the whole, the inconvenience, the disfigurement, and certainly some degree of distress are shown to be both substantial and permanent."

Although Mr. Luehr suffered severe injuries, it cannot be said that his pain and suffering was greater than that of Guthrie, or that his future pain and suffering will be greater than that anticipated by Guthrie. Mr. Luehr has all his limbs and the doctors testified that he can look forward to continued recovery from the pains of his fractures. Mr. Guthrie's leg, on the other hand, was gone forever.

It is respectfully submitted that an award which necessarily contemplates some $85,000 to $90,000 for pain and suffering is excessive. This Court, sitting in admiralty, should "review de novo, all the evidence on merits and on damages and render the decree it considers the District Court should have rendered". (Robinson on Admiralty, 1939 Ed., page 26.) *Brooklyn Eastern District Terminal v. U. S.* (supra).

SUMMARY OF POINTS ON DAMAGE.

The judgment should be reduced to a more reasonable figure in accordance with the immediately previous section of this brief.

In addition, a reduction should be made for the contributory negligence of Mr. Luehr in unnecessarily exposing himself to a position of danger beneath a suspended load in violation of the terms of the Pacific Coast Marine Safety Code promulgated for his protection. This contributory negligence is discussed at length in a previous portion of this brief. In addition to bringing the hold-harmless

agreement between the Government and Jones into operation, it operates to mitigate the damages. *American Stevedores v. Porello,* 330 U.S. 446, 458, 67 S. Ct. 847, 91 L. Ed. 1011.

To the ultimate award, there should then be credited the sum of $10,404.52 already paid by his employer as compensation and medical expenses. This credit should be given any award against the United States by virtue of the employer's waiver of subrogation against the United States. *Palardy v. U.S.,* 102 F. Supp. 534 (supra). This has already been fully explained in earlier portions of this brief. Upon a finding that the United States is entitled to indemnity from Jones, the amount already paid by Jones should, of course, be credited to the award, since Jones cannot be required to pay these special damages twice.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the amount of the award should be substantially reduced, the payments already made by way of compensation and medical expenses be credited to the award, the decree dismissing Jones Stevedoring Company should be reversed, and the United States be granted full indemnity from Jones Stevedoring Company by virtue of the terms of the express contract whereby Jones agreed to hold the United States harmless for any loss arising from a personal injury "*occasioned, either in whole or in part* by the

negligence'' of Jones, ''its officers, agents, or employees''.

Dated, San Francisco, California,
March 6, 1953.

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